

HUMAN SERVICES BOARD

In re) Fair Hearing No. 20,822
)
Appeal of)

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) finding him ineligible for Community Developmental Services. The following facts are not in dispute. Based on those facts, it is concluded that DAIL's actions in this matter violated the petitioner's statutory and due process rights to notice and timely appeal. Therefore, summary judgment for the petitioner is necessary and appropriate.

1. The petitioner is forty-four years old. He was found eligible for and began receiving developmental services when he was seventeen. Although the petitioner's precise diagnosis now may be in dispute, he received services in the past pursuant to a diagnosis of "mental retardation".

2. The petitioner was incarcerated in November 1999 following a conviction for breaking and entering. The

provision of developmental services was suspended during his incarceration.

3. The petitioner was released into the community for periods of time early in 2004. During these periods of release he again was provided with developmental services.

4. The petitioner returned to jail in September 2004. On December 3, 2004 DAIL's agent sent him a notice that the provision of his developmental services was terminated due to his incarceration. The notice said nothing regarding the petitioner's continuing eligibility for services, and there is no indication that he was provided with any notice regarding any appeal rights he might have.

5. In August 2006, in anticipation of his release from jail, the petitioner reapplied to DAIL for a resumption of developmental services. DAIL delayed action on the request until January 26, 2007, when it notified the petitioner as follows:

This letter is to formally notify you that your application for Community Developmental Services has been denied. Stated in the Developmental Disabilities Act of 1996, to qualify for services the applicant must have an IQ of 70 and below. The most recent review of your past Evaluations completed by [name] concludes that you do not meet the definition of having a Developmental Disability.

6. DAIL admits that it can make no claim or showing that it or its agents ever provided the petitioner with any other notice that it no longer considered him eligible for services based on his diagnosis or his incarceration.

7. The petitioner was released from jail in May 2007 and has not received any services from DAIL or any agency under its aegis. He alleges that he cannot function independently in the community without these services.

ORDER

DAIL's decision is reversed. The petitioner's eligibility for developmental services shall be restored and DAIL shall immediately start providing him with such services in accordance with what it determines to be the petitioner's needs and with its developmental services system of care plan. The petitioner retains the right to appeal any subsequent decision by DAIL and/or its agents regarding the type, amount, and scope of such services.

REASONS

Community Developmental Services are administered by and provided through DAIL pursuant to the Developmental Disabilities Act of 1996. 18 V.S.A., Chapter 244A. Section 8727 of the Act provides, in pertinent part:

(a) **Notice.** The department or agency or program funded by the department shall provide notice:

(2) To a person with a developmental disability or the person's guardian, as applicable, of any decision to deny, suspend, reduce or terminate services, prior to any action by the Department or agency of program funded by the department and the procedure for appealing the decision.

To say that DAIL flagrantly and egregiously violated the above provision in this case is an understatement. As noted above, after returning to jail in September 2004, and having just been able to have resumed receiving services immediately following a prior period of incarceration, the petitioner received no notice or indication whatsoever that DAIL had made any decision regarding his continuing eligibility for services.¹ Despite this lack of notice, DAIL essentially treated his August 2006 request for resumption of services as a "reapplication" for *eligibility* for such services. As noted above, it was not until January 2007 that DAIL notified the petitioner that this "application" has been denied. However, inasmuch as DAIL had never legally terminated the petitioner's eligibility for services in the first place, the

¹ DAIL maintains that a change in its System of Care Plan that became effective in July 2004 allowed it to review the petitioner's continuing eligibility once he returned to jail. Other than a brief advisory comment that based on a plain reading DAIL's plans such an argument appears highly dubious, the Board need not address DAIL's *ex post facto* rationalizations in light of the clear due process and statutory violations that are found to have occurred.

entire "reapplication" process, at least in terms of the petitioner's eligibility for services, can only be deemed a nullity.

If the petitioner's eligibility for services is not immediately restored, one can only speculate as to the extent of the harm to the petitioner that may have been caused by DAIL's actions-not the least of which may be to wonder whether he would have even been sent to jail in the first place, or been allowed to remain there, had the sentencing court known that his eligibility for community developmental services for the rest of his life could be terminated as a result.

#